

These are the tentative rulings for civil law and motion matters set for Tuesday, November 5, 2013, at 8:30 a.m. in the Placer County Superior Court. The tentative ruling will be the court's final ruling unless notice of appearance and request for oral argument are given to all parties and the court by 4:00 p.m. today, Monday, November 4, 2013. Notice of request for oral argument to the court must be made by calling (916) 408-6481. Requests for oral argument made by any other method will not be accepted. Prevailing parties are required to submit orders after hearing to the court within 10 court days of the scheduled hearing date, and after approval as to form by opposing counsel. Court reporters are not provided by the court. Parties may provide a court reporter at their own expense.

EXCEPT AS OTHERWISE NOTED, THESE TENTATIVE RULINGS ARE ISSUED BY COMMISSIONER MICHAEL A. JACQUES AND IF ORAL ARGUMENT IS REQUESTED, ORAL ARGUMENT WILL BE HEARD IN DEPARTMENT 40, LOCATED AT 10820 JUSTICE CENTER DRIVE, ROSEVILLE, CALIFORNIA.

1. M-CV-0050277 Mills, Robert E. vs. Hammond, Scott, et al

Defendant Scott Hammond's Motion to Issue Satisfaction of Judgment is denied without prejudice. There is no proof of service in the court's file establishing that this motion was served on plaintiff. Defendant also fails to demonstrate that he sent written demand to plaintiff at least 15 days prior to filing this motion in compliance with Code of Civil Procedure section 724.050(b), and fails to authenticate the exhibits attached to his declaration.

2. M-CV-0057730 BH Financial Services, LLC vs. Leidecker, Jack D.

Plaintiff's Motion for Order to Deem Matters Admitted is denied without prejudice. The proof of service attached to plaintiff's motion indicates that defendant was served with plaintiff's moving papers on August 26, 2013. The hearing on this matter was originally set for October 3, 2013. On October 2, 2013, the court issued a tentative ruling dropping the motion from the calendar, as no moving papers had been filed. On October 3, 2013, plaintiff's counsel appeared and the court granted a request to continue the hearing to November 5, 2013. However, there is no indication that plaintiff served defendant with notice of the continued hearing date. Consequently, plaintiff's motion is denied.

3. M-CV-0059619 SFC Windscape Investors, LP vs. Carlson, Gloria D.

Plaintiff's request for judicial notice is granted. Defendant Gloria Clarkson's Motion to Set Aside Default is denied. The proof of service in the court's file indicates that defendant was personally served with the summons and complaint in this action on October 6, 2013. Defendant discusses potential defenses to the unlawful detainer action, but does not offer any explanation for her failure to timely respond to the complaint. Defendant also fails to attach a copy of her proposed answer as required. Code Civ. Proc. § 473(b).

4. S-CV-0024879 Patterson, Howard vs. Rogers, Daryl et al

Defendant Matt Eller's Objections to Declaration of Chad Vierra are ruled on as follows: Objection No. 1 is sustained. Objection No. 2 is overruled.

Plaintiff's Motion for Monetary and Issue Sanctions is granted in part, and denied in part.

Defendant Matt Eller ("Eller") failed to appear for his duly noticed deposition, and a subsequent motion to compel attendance and production of documents was granted, with the court ordering Eller to appear for his deposition and produce documents on March 1, 2013. Eller failed to appear as ordered by the court. Plaintiff moves for monetary and issue sanctions based on Eller's failure to obey a court order compelling his attendance

Plaintiff's request for monetary sanctions is granted. If a party fails to obey an order compelling attendance, testimony and production, the court may impose monetary sanctions against that party. Code Civ. Proc. § 2025.450(h). Plaintiff requests sanctions in the total amount of \$4,194.80 for attorneys' fees, court reporter costs, and court costs incurred by plaintiff in connection with Eller's failure to comply with the court order compelling his attendance and the production of documents at deposition. Eller argues that his failure to appear was not willful, as he lacked the necessary funds to travel to California to attend his deposition. Eller's opposition is supported only by the declaration of his counsel, who notes that Eller sent a letter to the court prior to the hearing on the motion to compel, stating that he could not afford to attend his deposition. Eller himself has submitted no declaration in opposition to this motion. The court finds that Eller was on notice of the court's ruling granting plaintiff's motion to compel, and that Eller's failure to comply with the order was willful. Eller fails to adequately establish that it was not possible for him to travel to California to attend his deposition as ordered. Eller does not challenge the amount of fees and costs sought by plaintiff. Plaintiff is awarded sanctions in the amount of \$4,194.80 against Eller.

Plaintiff's request for issue sanctions is denied. As an issue sanction, the court may order that designated facts shall be taken as established without further proof, or may prohibit the party who committed a discovery abuse from supporting or opposing designated claims or defenses. Code Civ. Proc. § 2023.030(b). Patterson requests an order authorizing him to use Eller's deposition, direct testimony by declaration, and in-person trial testimony taken in a separate bankruptcy proceeding, "for any and all purposes". The order requested by Patterson is not an issue sanction, and is not an authorized sanction under Code of Civil Procedure sections 2023.030 or 2025.450.

5. S-CV-0025503 Espinoza, Alejandro "Alex" vs. Squaw Creek Transp. Inc, et al

The Motion to Withdraw as Counsel of Record is dropped. No moving papers were filed.

6. S-CV-0027169 American Express Bank, FSB vs. Gyori, Jeremy Ross

Plaintiff's Motion to Enter Judgment Pursuant to CCP § 664.6 is granted. Judgment shall be entered against defendant Jeremy Ross Gyori in the principal amount of \$68,005.65.

7. S-CV-0029431 Capper, James vs. Mass Mutual Insurance Co., et al

Defendant Massachusetts Mutual Life Insurance Company's ("MassMutual's") Motion to Compel Responses to Request for Production, Set Three, is granted. Plaintiff shall serve verified responses, without objections, to the subject requests by no later than November 20, 2013.

MassMutual's Motion to Compel Further Responses to Special Interrogatories, Set Three, is granted. In responding to interrogatories, plaintiff has a duty to provide responses that are "as complete and straightforward as the information reasonably available to the responding party permits. If an interrogatory cannot be answered completely, it shall be answered to the extent possible." Code Civ. Proc. § 2030.220(a), (b). Plaintiff's responses to the subject special interrogatories assert meritless objections, and fail to fully and completely respond to the interrogatories. Plaintiff shall serve verified, full and complete responses, without objections, to the subject interrogatories by no later than November 20, 2013.

MassMutual's request for sanctions in relation to both motions is denied, as plaintiff expressly did not oppose either motion. Code Civ. Proc. §§ 2030.290(c), 2031.300(c). Although California Rules of Court, rule 3.1348(a) purports to authorize sanctions if a motion is unopposed, the court declines to do so, as the specific statute governing this discovery authorizes sanctions only if the motion was unsuccessfully made or opposed. Any order imposing sanctions under the California Rules of Court must conform to the conditions of one or more of the statutes authorizing sanctions. *Trans-Action Commercial Investors, Ltd. v. Firmaterr Inc.* (1997) 60 Cal.App.4th 352, 355.

If oral argument is requested, MassMutual's request for telephonic appearance is granted. Effective July 1, 2013, all telephonic appearances must be arranged through CourtCall.

8. S-CV-0030429 Lincoln Crossing Comm. Assn vs. LB/L Suncal Lincoln

Defendant and Cross-Complainant LB/L-Suncal Lincoln Crossing, LLC's ("Suncal's") Motion for Leave to File First Amended Cross-Complaint is granted. The court's discretion will usually be exercised liberally to permit amendment of the pleadings. *Nestle v. Santa Monica* (1972) 6 Cal.3d 920, 939. Courts must apply a policy of great liberality in permitting amendments to the complaint "at any stage of the proceedings, up to and including trial," unless prejudice to the adverse party is shown. *Atkinson v. Elk Corp.* (2003) 109 Cal.App.4th 739, 761. Even where a party unreasonably delays in moving to amend, leave must still be granted "where the opposing party was not misled or prejudiced by the amendment." *Kittredge Sports Co. v. Superior Court* (1989) 213 Cal.App.3d 1045, 1048.

Plaintiff contends that it will be prejudiced in that the addition of two new parties could jeopardize the current discovery plan, possibly requiring a continuance of the trial date of April 1, 2014. Plaintiff's speculation is insufficient to establish prejudice justifying denial of Suncal's motion. *See Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 486-488.

Suncal shall file its first amended cross-complaint by no later than November 12, 2013.

9. S-CV-0031811 CD 2005-CD1 Office 406 LP vs. Volen, LLC

Receiver Terrence Daly's Final Accounting Report is approved. The interim payment of Receiver's fees in the amount of \$22,717.65, and payment of current Receiver fees in the amount of \$2,267.95 are approved. Receiver is authorized to retain the sum of \$1,500 to pay final Receiver fees and invoices, with any remainder to be distributed to plaintiff. Receiver is authorized to disburse surplus funds in the amount of \$78,823.20 to plaintiff. Receiver is hereby discharged, and the Receiver's bond is exonerated.

If oral argument is requested, the Receiver's request for telephonic appearance is granted. Effective July 1, 2013, all telephonic appearances must be arranged through CourtCall.

10. S-CV-0031913 Winfrey, Walter vs. Maureen, Shawna

The Motion to Withdraw as Counsel of Record was dropped by the moving party.

11. S-CV-0032113 Rose, Stephen, et al vs. Lennar Renaissance, Inc.

The Motion for Leave to Intervene by Maryland Casualty Company, Assurance Company of America-Zurich, Insurer for Cross-Defendant Heritage Drywall, Inc., is granted. Moving party shall file and serve its complaint-in-intervention by no later than November 19, 2013.

The Motion for Leave to File Complaint in Intervention by Travelers Indemnity Company on behalf of CLF Enterprises, Inc., dba The Door & Window Company, is granted. Moving party shall file and serve its complaint-in-intervention by no later than November 19, 2013.

12. S-CV-0032121 Davidson, Bruce vs. Ford Motor Company

Defendant's request for judicial notice is granted. Plaintiff's Motion for Leave to File a First Amended Complaint is granted.

The court's discretion will usually be exercised liberally to permit amendment of the pleadings. *Nestle v. Santa Monica* (1972) 6 Cal.3d 920, 939. Courts must apply a policy of great liberality in permitting amendments to the complaint "at any stage of the proceedings, up to and including trial," unless prejudice to the adverse party is shown. *Atkinson v. Elk Corp.* (2003) 109 Cal.App.4th 739, 761. If the party seeking leave to amend is willing to postpone the trial, proximity to the trial date is not grounds for denial. *Mesler v. Bragg Mgmt. Co.* (1985) 39 Cal.3d 290, 297. Even upon a showing of some prejudice to the opposing party, the court may permit amendments with imposed conditions, including continuance of the trial date. Code Civ. Proc. §§ 473(a)(1), 576; *Fuller v. Vista Del Arroyo Hotel* (1941) 42 Cal.App.2d 400, 404.

Defendant does not argue that it will be prejudiced by granting plaintiff leave to file an amended complaint. Although defendant asserts that plaintiff's complaint is barred by the doctrine of res judicata, the court will not consider the validity of the proposed amended pleading

at this juncture. Defendant will have the opportunity to attack the validity of the amended pleading after it is filed.

Both parties concede that a continuance of the trial date is appropriate if leave to amend is granted. **Accordingly, the currently scheduled mandatory settlement conference, civil trial conference, and trial date are hereby vacated. Trial in this action shall be set for June 23, 2014. A mandatory settlement conference is set for June 6, 2014 at 8:30 a.m. in the Jury Services/Master Calendar department. A civil trial conference is set for June 13, 2014 at 8:30 a.m. in Department 42.**

The motion to continue trial, set for November 7, 2013 at 8:30 a.m. in Department 42, is dropped as moot.

Plaintiff shall file his amended complaint by no later than November 19, 2013.

If oral argument is requested, the parties' requests for telephonic appearance are granted. Effective July 1, 2013, all telephonic appearances must be arranged through CourtCall.

13. S-CV-0032307 Umpqua Bank vs. Miller, Scott A., et al

Plaintiff's request for judicial notice is granted as to Exhibits A-C, and denied as to Exhibit D. Plaintiff's Motion for Summary Judgment is granted.

A motion for summary judgment shall be granted if "all the papers submitted show that there is no triable issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Code Civ. Proc. §437c(c). Plaintiff submits evidence to establish the elements of each cause of action stated in the complaint for breach of contract, common counts and judicial foreclosure. (Pltf. SSUF 1-40). In reply, plaintiff also notes that its Motion to Establish Admissions was recently granted as against defendant Frank Miller ("Miller"), thereby establishing that Miller is indebted to plaintiff under the loan described in the complaint, is in default under the terms of the loan, and that as of November 5, 2012, the sum of \$617,700.08 is due and owing on the subject loan.

As plaintiff has satisfied its initial burden of production to make a prima facie showing that there are no triable issues of material fact, the burden shifts to defendant to show the existence of a triable issue of material fact. *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850. As defendant filed no opposition to plaintiff's motion, he fails to satisfy his burden of showing the existence of a triable issue of material fact. Accordingly, summary judgment is granted against defendant Miller, in favor of plaintiff, as prayed for in the complaint.

14. S-CV-0032687 Wells Fargo Bank, N.A. vs. Zarakani, Saeed

The Motion for Summary Judgment is continued to November 26, 2013 at 8:30 a.m. in Department 32 to be heard by the Honorable Mark S. Curry.

15. S-CV-0032723 Rosene, Donald G. et al vs. Mortgageit, Inc. et al

The Motion for Attorneys' Fees is dropped. No moving papers were filed.

16. S-CV-0033373 John L. Sullivan Chevrolet, Inc. vs. Fobbs, Marlen Dion

Plaintiff's Application for Writ of Possession is granted. Plaintiff establishes the probable validity of its claim to possession of the subject property, identified as 2012 Chevrolet Camaro LS; VIN: 2G1FE1E36C9152758. The clerk of the court is directed to issue a writ of possession immediately. No undertaking shall be required, as the court finds that defendant has no interest in the property. Code Civ. Proc. § 515.010(b).

17. S-CV-0033519 Napoles, Santiago vs. One West Bank FSB

Appearance required. Defendant is advised that the notice of motion must contain notice of the court's tentative ruling procedures. Local Rule 20.2.3(C). One West's request for telephonic appearance is granted. Effective July 1, 2013, all telephonic appearances must be arranged through CourtCall.

Defendant One West Bank FSB's ("One West's") request for judicial notice is granted. One West's Demurrer to Complaint is sustained without leave to amend.

The basis of each cause of action stated in plaintiff's complaint is the alleged failure of One West to comply with Civil Code section 2923.5. The only available remedy for a violation of this statute is a postponement of a pending foreclosure sale, before the sale happens. *Mabry v. Superior Court* (2010) 185 Cal.App.4th 108, 235. Noncompliance with the statute will not cloud title after an otherwise properly conducted foreclosure sale. *Id.* Based on documents of which the court takes judicial notice, a trustee's sale of the subject property took place on July 10, 2013, and a trustee's deed upon sale was recorded on August 6, 2013. As a foreclosure sale of the property has already taken place, no remedies are available to plaintiff based on a purported violation of Civil Code section 2923.5, and each cause of action alleged in the complaint fails to state a valid claim.

Plaintiff's first cause of action for wrongful foreclosure separately fails to state a claim because plaintiff fails to allege tender the amount of the secured indebtedness. *Abdallah v. United Savs. Bank* (1996) 43 Cal.App.4th 1101, 1109-1110. Plaintiff's allegation regarding his willingness to submit a loan modification application does not adequately allege tender.

Plaintiff's second cause of action for fraud through negligent misrepresentation also fails to state a valid claim because it is not pled with requisite specificity. Negligent misrepresentation is a species of fraud and the claim must meet the heightened pleading standard of particularity. *Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 173-174. When pleading fraud against corporate defendants, plaintiffs must specify the identity of the person who made the misrepresentation, his authority to speak on behalf of the corporation, and when and to whom the representation was made. *Tarmann v. State Farm Mut. Auto Ins. Co.* (1991) 2 Cal.App.4th 153, 157.

Plaintiff's third cause of action for breach of contract also fails to state a valid claim because plaintiff fails to allege his own performance or excuse for nonperformance. Plaintiff's fourth cause of action for violation of Business and Professions Code section 17200 is based on the purported failure to comply with Civil Code section 2923.5., and fails to adequately allege unfair, unlawful or fraudulent conduct by One West. Although plaintiff separately alleges that One West violated Business and Professions Code section 17200 by representing to plaintiff that the foreclosure process would be delayed during the loan modification process, plaintiff does not allege that he submitted a loan modification application, or that One West was considering him for a loan modification. Plaintiff's fifth cause of action for declaratory relief is based wholly on allegations supporting plaintiff's other alleged causes of action, and fails because those claims fail.

Plaintiff bears the burden of demonstrating how the complaint may be amended to cure the defects therein. *Assoc. of Comm. Org. for Reform Now v. Dept. of Indus. Relations* (1995) 41 Cal.App.4th 298, 302. A demurrer shall be sustained without leave to amend absent a showing that a reasonable possibility exists that the defects can be cured by amendment. *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318. The complaint does not suggest on its face that it is somehow capable of amendment and plaintiff has failed to make any showing that the complaint can be amended to change its legal effect. The demurrer is sustained without leave to amend.

In light of the ruling on the demurrer, the motion to strike is dropped as moot.

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